STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Tanya A. Gee, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF DANIEL LEE LARD,

APPELLANT

APPELLATE CASE NO. 2015-001940

INITIAL BRIEF OF APPELLANT

David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this SVP case, did the trial court err in denying appellant's motion for a directed verdict because the State's hired expert's diagnosis of antisocial personality disorder was both factually and legally insufficient for commitment under the SVP statute?

STATEMENT OF THE CASE

On October 28, 2014, the Attorney General filed a petition to commit appellant Daniel Lard under the Sexually Violent Predator Act. R. ___ (State's SVP Petition). Appellant's immediate predicate offense was a guilty plea for second degree criminal sexual conduct with a minor. R. ___ (State's SVP Petition, Ex. C). The Honorable Michael G. Nettles sentenced appellant to twenty years' imprisonment suspended upon time served and three years' probation. R. ___ (State's SVP Petition, Ex. C).

On August 31, 2015, appellant's SVP trial was held before the Honorable Tanya A. Gee and a jury. Tr. 1. Christopher Morrow represented the State. Tr. 1. Aimee J. Zmroczek represented appellant. Tr. 1. The jury determined that appellant met the definition of a sexually violent predator. Tr. 195, ll. 8 – 17. Judge Gee committed appellant. Tr. 200, ll. 4 – 6. This appeal follows.

ARGUMENT

In this SVP case, the trial court erred in denying appellant's motion for a directed verdict because the State's hired expert's diagnosis of antisocial personality disorder was both factually and legally insufficient for commitment under the SVP statute.

Appellant Daniel Lard received a suspended, time-served sentence for second degree criminal sexual conduct for having sex with a fifteen-year-old girl when he was twenty years old. Tr. 151, ll. 2 – 7. R. ___ (State's SVP Petition, Ex. C). Appellant also received three years' probation. R. ___ (State's SVP Petition, Ex. C). Appellant's probation was revoked because he left the state without permission. Tr. 134, ll. 14 – 25. Appellant was having trouble making enough money to pay the fines and fees associated with probation and left the state to make more money. Tr. 134, l. 14 – 135, l. 11.

Despite receiving a time-served sentence and a revocation of probation that did not include any acts of sex or violence, the Attorney General initiated SVP proceedings when the term of appellant's probation revocation concluded. Dr. Marie Gehle ("Gehle") of the Department of Mental Health was appointed by the court to evaluate appellant. Tr. 145, l. 15 – 146, l. 3. Dr. Gehle did not recommend commitment. Tr. 155, ll. 16 – 22. Dr. Gehle did not find the existence of a mental abnormality or personality disorder. Tr. 148, ll. 9 – 11. Tr. 153, l. 12 – 154, l. 6. Dr. Gehle also credited appellant's improvement since his early confinement in DJJ and the observations of his therapist in prison who said he did well in treatment. Tr. 150, ll. 2 – 22.

The Attorney General rejected Dr. Gehle's independent opinion and, at the cost of $4,500.00, hired Dr. Amy Swan ("Swan"), who is in private practice in Florida, to evaluate appellant. Tr. 60, l. 25 – 61, l. 5. Tr. 100, l. 4 – 101, l. 8. Tr. 63, ll. 1 – 11. Dr. Swan had

testified for the Attorney General fourteen other times in South Carolina, which would amount to $63,000.00 in fees assuming she was paid the same each time. Tr. 61, ll. 16 – 22. Unsurprisingly, Dr. Swan recommended committing appellant. Tr. 96, ll. 2 – 17.

The principal disagreement between the experts at trial was whether appellant had the requisite mental abnormality or personality disorder necessary to qualify as an SVP. The Attorney General's hired expert diagnosed appellant with antisocial personality disorder. Tr. 76, ll. 6 – 13. The independent court-appointed expert from DMH did not. Tr. 148, ll. 9 – 11. Appellant does **not** have pedophilia. Tr. 108, ll. 21 – 23.

The hired expert, Dr. Swan, explained:

> There are two pathways to committing a sexual crime. One is having a sexual disorder. In this case I did not diagnose Mr. Lard with a sexual disorder. But the other pathway **is having a general criminal lifestyle** or having antisocial personality disorder. I did diagnose him with that.

Tr. 75, ll. 3 – 12 (emphasis added).

Dr. Swan relied on appellant's disciplinary infractions in DJJ to make her diagnosis. Tr. 75, l. 13 – 76, l. 13. Appellant had twenty-two infractions in DJJ. Tr. 75, l. 13 – 76, l. 2. However, as an adult in the Department of Corrections, this number had reduced to only one infraction. Tr. 75, l. 13 – 76, l. 2. None of these infractions were sexual in nature. Tr. 76, ll. 3 – 5. The lone infraction in the Department of Corrections was for cutting some pants and making shorts. Tr. 110, l. 25 – 111, l. 11. Nevertheless, Dr. Swan stated appellant's disciplinary infractions were "significant" to her diagnosis of antisocial personality disorder because one of its features "is obviously a rule-breaking behavior, not being able to follow the rules, comply with the laws." Tr. 76, ll. 6 – 13.

Dr. Swan mined appellant's mental health history for further evidence to support her diagnosis of antisocial personality disorder. Tr. 80, l. 22 – 82, l. 15. She found many of the documents "significant." Tr. 80, l. 22 – 82, l. 15. For example, appellant "does not do his chores." Tr. 80, l. 22 – 82, l. 15. Appellant also "had a chip on his shoulder" and had a "poor attitude toward the staff members." Tr. 80, l. 22 – 82, l. 15. Dr. Swan listed the characteristics of antisocial personality disorder:

- "failure to conform to social norms with respect to lawful behavior"
- "deceitfulness, impulsivity, irritability and aggressiveness"
- "reckless disregard for the safety of self and others"
- "consistent irresponsibility"
- "lack of remorse"

Tr. 93, ll. 4 – 11. She stated that while antisocial personality disorder is "not curable," individuals tend to "mellow out" when they reach their forties (appellant was 28 at the time of trial). Tr. 93, ll. 12 – 17. She described this as "a burnout of criminal behavior." Tr. 93, ll. 12 – 17.

Dr. Swan said appellant had many of these characteristics. Tr. 93, l. 18 – 95, l. 21. She cited his conviction for CSC and arrests for grand larceny and burglary as evidence of his lack of respect for lawful behavior. Tr. 93, l. 18 – 95, l. 21. Among the evidence of deceitfulness, Dr. Swan cited lying to his probation officer and being unfaithful to the mother of his children. Tr. 93, l. 18 – 95, l. 21. Appellant showed irritability and aggressiveness, in part because he hit his mother with a BB gun when he was a child. Tr. 93, l. 18 – 95, l. 21. Dr. Swan also said appellant showed evidence of "conduct disorder" prior to age fifteen in part because he kicked several

children in the groin when he was eleven years old and shot a dog with a BB gun. Tr. 93, l. 18 – 95, l. 21.

On cross-examination, Dr. Swan admitted that antisocial personality disorder cannot be diagnosed until an individual is eighteen years old. Tr. 109, ll. 3 – 9. Prior to the Attorney General hiring Dr. Swan in 2015, no one had ever diagnosed appellant with antisocial personality disorder. Tr. 108, l. 21 – 109, l. 9. Appellant's therapist in the Department of Corrections never diagnosed him with antisocial personality disorder and Dr. Swan agreed the therapist rated appellant "at the top of his class" in his treatment. Tr. 117, ll. 3 – 13.

Defense counsel questioned Dr. Swan about whether antisocial personality disorder meant appellant could not control his behavior. Tr. 117, l. 22 – 119, l. 19. Dr. Swan stated that "75 to 80 percent of the men in prison have antisocial personality disorder." Tr. 118, ll. 13 – 21. When asked directly whether appellant's purported antisocial personality disorder means appellant had a lack of ability to control his behavior, Dr. Swan replied, "Not necessarily. Sometimes they **choose** not to control their behavior." Tr. 118, ll. 8 – 12 (emphasis added).

Dr. Swan was the State's only witness and the State rested after her testimony. Tr. 126, ll. 16 – 19. Appellant moved for a directed verdict. Tr. 127, l. 25 – 131, l. 2. Defense counsel argued there was no "link between the antisocial personality disorder and the volition requirement." Tr. 127, l. 25 – 128, l. 4. Defense counsel also argued that Dr. Swan's opinion was factually insufficient because most of the incidents she used to diagnose appellant occurred before age eighteen when antisocial personality disorder cannot be diagnosed. Tr. 127, l. 25 – 131, l. 2. The Attorney General argued that antisocial personality disorder "is directly linked to his risk to re-offend and his volition[al] capacity." Tr. 130, ll. 7 – 18. Judge Gee denied

appellant's motion. Tr. 130, l. 19 - 131, l. 2. Appellant renewed his motion at the close of his case. Tr. 164, l. 22 – 165, l. 5.

The trial judge erred in denying appellant's directed verdict motion. The Attorney General failed to prove that appellant's supposed antisocial personality disorder was legally sufficient for commitment under the SVP Act. The Act and due process require a link between the personality disorder and the likelihood of reoffending. Kansas v. Hendricks, 521 U.S. 346, 371-72 (1997). In Justice Kennedy's concurrence in Hendricks, he stated that if "it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." Id. at 372. The vagueness and generality of antisocial personality is just the imprecision against which Justice Kennedy warned.

The majority in Hendricks wrote extensively about whether the Kansas statute's definition of mental abnormality satisfied substantive due process. Id. at 356-60. Approving the Kansas statute, the Court wrote that it required "evidence of past sexually violent behavior and a present mental condition **that creates** a likelihood of such conduct in the future if the person is not incapacitated." Id. at 357 (emphasis added). Focusing on the lack of control, the Court stated that the "lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes Hendricks from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." Id. at 360. From the Court's opinion, it is clear that due process requires a link between the mental abnormality and the inability to control future sexual behavior.

The Supreme Court refined its holding in Kansas v. Crane, 534 U.S. 407 (2002). The Court rejected the defendant's argument that due process requires the state to prove complete

lack of control. Id. at 411. But the Court also rejected the state's argument that it did not have to prove any lack of control. Id. at 412. The Court wrote that the lack of control finding distinguishes dangerous sexual offenders from other persons who are dangerous and this "distinction is necessary lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment. Id. In its citation for this sentence, the Court noted a study that found that "40% - 60% of the male prison population is diagnosable with antisocial personality disorder." Id. *citing* Moran, The Epidemiology of Antisocial Personality Disorder, 37 Social Psychiatry & Psychiatric Epidemiology 231, 234 (1999). The Court further held that there "must be proof of serious difficulty in controlling behavior." Id. at 413. Elaborating, the Court stated that the proof of lack of control

> when viewed in light of such features of the case as the **nature of the psychiatric diagnosis**, and **the severity of the mental abnormality itself**, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment **from the dangerous but typical recidivist convicted in an ordinary criminal case.**

Id. (emphasis added).

Our Supreme Court interpreted Crane in In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002). The Court wrote in Luckabaugh, "[W]e believe Crane holds the substantive due process clause requires a court to determine an individual suffers from a mental illness **which makes it** seriously difficult, though not impossible, for that person to control his dangerous propensities." Luckabaugh at 143, 568 S.E.2d at 348 (emphasis added). "Inherent within the mental abnormality prong of the Act is a lack of control determination . . . ." Id. at 144, 568 S.E.2d at 349. Like the United States Supreme Court, our Supreme Court requires a link between the mental abnormality or personality disorder and the defendant's

inability to control his sexual impulses. "The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement." In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted).

Dr. Swan's diagnosis of antisocial personality disorder is legally insufficient to meet the constitutional and statutory requirement of a "personality disorder that makes the person likely to engage in acts of sexual violence" unless committed. In re Taft, 413 S.C. 16, 22, 774 S.E.2d 462, 465 (2015). As Dr. Swan admitted, 75-80% of the male prison population could be diagnosed with antisocial personality disorder. Tr. 118, ll. 13 – 21. Dr. Swan's response to the lack of control question unwittingly demonstrated the nonexistent connection. Tr. 118, ll. 8 – 12. She replied, "Not necessarily. Sometimes they **choose** not to control their behavior." Tr. 118, ll. 8 – 12 (emphasis added). The hired expert's use of the word "choose" is important. If someone can choose whether to break the law, that does not indicate a lack of control. Our criminal law exists to punish those who choose to break the law. The SVP Act exists for those who cannot control their behavior.

Antisocial personality disorder has recently been held legally insufficient by the New York Court of Appeals. State v. Donald DD, 24 N.Y.3d 174 (2014). In Donald DD.'s case, he had sex with a fourteen-year-old acquaintance when he was eighteen and then forced himself on her twelve-year-old cousin in 2002. Id. at 181. In 2004, after his release from prison, Donald DD. raped his wife's friend in a cemetery. Id. After his release, he violated probation and was then released again on parole when he molested his children and had forcible sex with his wife. Id. at 182. His parole was revoked and the state brought an SVP proceeding against him. Id. at 182-83. Two psychologists testified that Donald DD. had antisocial personality disorder. Id. Like appellant,

Donald DD. was not diagnosed with any paraphilias. Id. at 183. Both psychologists testified that Donald DD.'s antisocial personality disorder gave him serious difficulty in controlling his sex-offending conduct. Id. at 183-84.

Citing Crane and other authorities for the point that the vast majority of all incarcerated offenders could be diagnosed with antisocial personality disorder, the court held:

> **A diagnosis of [antisocial personality disorder] alone**—that is, when the [antisocial personality disorder] diagnosis is not accompanied by a diagnosis of any other condition, disease or disorder alleged to constitute a mental abnormality—**simply does not distinguish the sex offender whose mental abnormality subjects him to civil commitment from the typical recidivist convicted in an ordinary criminal case.**

Id. at 190 (emphasis added). The court's analysis reveals that a diagnosis of antisocial personality disorder simply has so little probative value regarding inability to control the commission of sexual crimes that it was legally insufficient to form the basis for commitment. Id. at 190-92. Appellant urges this Court to adopt the New York Court of Appeals' reasoning in Donald DD.[1]

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[1] Appellant expects the Attorney General to urge some form of procedural bar against some or all of appellant's directed verdict argument. Trial counsel argued that antisocial personality disorder was not linked to appellant's lack of control. Tr. 127, l. 25 – 128, l. 4. But to the extent that the Court entertains any procedural bar argument, appellant would assert that in an SVP case, such bars are not proper pursuant to the Due Process Clause because, if barred, appellant has no other means to raise the claim. Currently the South Carolina Supreme Court is considering a case that asks it to recognize an SVP defendant's right to raise ineffective assistance of counsel claims on direct appeal. See In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016). The right to the effective assistance of counsel in SVP cases flows from the Due Process Clauses of both the United States and South Carolina Constitutions. U.S. Const. amend. V, XIV; S.C. Const. Art. I, § 3. Addington v. Texas, 441 U.S. 418, 425 (1979). Vitek v. Jones, 445 U.S. 480, 492 (1980). But see In the Matter of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 58 (2004). Appellant urges this Court to adopt the reasoning of the Kansas Supreme Court in In re Ontiberos, 287 P.3d 855, 865 (Kan. 2012) and consider any claims that would be traditionally unpreserved in this direct appeal.

As Justice Kennedy wrote in Hendricks, "If the civil system is used to simply impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function." Hendricks, 521 U.S. at 372 (Kennedy, J., concurring). Appellant was given a time-served sentence by Judge Nettles for his underlying offense. Appellant's probation violation had nothing to do with sex or violence. The Attorney General, with its hired expert Dr. Swan, rejected DMH's opinion that appellant did not need to be committed under the SVP Act. As concisely stated by defense counsel in her opening statement to the jury, appellant is not "the worst of the worst" for whom the SVP Act was intended. Tr. 54, l. 25 - 55, l. 1. The trial court erred in not directing a verdict. This Court should reverse and order appellant's release.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and order his release.

Respectfully submitted,

Susan B. Hackett for
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of July, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Tanya A. Gee, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF DANIEL LEE LARD,

APPELLANT

APPELLATE CASE NO. 2015-001940

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Daniel Lee Lard, at Sexual Violent Predator Program, 7901 Farrow Road, Columbia, SC, 29203, this 13th day of July, 2016.

Susan B. Hackett for
David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 13th day of July, 2016.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: 5/12/2025.